92-1888

No. _____

MAY 25 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONSTRUCCIONES AERONAUTICAS, S.A.,
a Foreign Corporation,

Petitioner,

- v. -

DIERDRE M. SHERER, Administratrix of the Estate of
David W. Sherer, deceased,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court lacked *in personam* and subject matter jurisdiction over a foreign state defendant where the plaintiff failed to serve process upon the defendant in strict compliance with the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608, by failing to follow the hierarchical order of the methods of service provided in the Act, and by failing to serve, with the summons and complaint, a translated copy of those documents in the official language of the defendant.

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the Sixth Circuit: Dierdre M. Sherer, Administratrix of the Estate of David W. Sherer, deceased, and Construcciones Aeronauticas, S.A.

Construcciones Aeronauticas, S.A. is an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603(b) (1988) because a majority of its shares are, and have been, at all relevant times, owned by the Kingdom of Spain through wholly-owned holding companies.[1]

[1] The "parent" and subsidiary companies of petitioner Construcciones Aeronauticas, S.A. are as follows: The Government of Spain owns 100% of Instituto National De Industria (INI) which in turn owns TENEO, a holding company. TENEO owns 99.2853% of petitioner Construcciones Aeronauticas, S.A. Petitioner owns 100% of CASA Aircraft U.S.A., Inc. and 60% of Companea Espanola De Sistemas Aeronauticas, S.A. (CESA). Petitioner also owns minority positions in other companies.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears in the appendix to this petition (App. 1a - 9a) and has been reported at 987 F.2d 1246 (6th Cir. 1993).

Also in the appendix are the opinion of the District Court for the Northern District of Ohio (David D. Dowd, Jr., D.J.) granting petitioner's motion to dismiss on the grounds of lack of jurisdiction and lack of proper service of process (App. 10a-14a) and the

memorandum opinion of the district court granting respondent's motion for entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (App. 15a-19a).

JURISDICTION

On March 2, 1993, the Court of Appeals for the Sixth Circuit entered judgment reversing the decision of the District Court for the Northern District of Ohio and holding that *in personam* and subject matter jurisdiction had been obtained over petitioner pursuant to the Foreign Sovereign Immunities Act. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1)(1988).

STATUTES INVOLVED

This case involves the application of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1391(f) and 1602 *et seq.* (1988), and specifically the FSIA's service of process provisions, 28 U.S.C. § 1608(a), (b) and (c) (1988). Section 1608(a), (b) and (c) of the FSIA is reprinted in the appendix to this petition. (App. 20a-22a).

STATEMENT OF THE CASE

On March 4, 1987, a C-212-CC model aircraft crashed on approach to Detroit Metropolitan Airport. David W. Sherer was the pilot of the aircraft. The aircraft was manufactured in Spain by petitioner Construcciones Aeronauticas, S.A. ("CASA").

On March 6, 1989, respondent Dierdre M. Sherer, as administratrix of the estate of David W. Sherer, filed a wrongful death action in the Court of Common

Pleas, Crawford County, Ohio, naming CASA as one of the defendants in the action. After the complaint was filed, respondent attempted service of process upon CASA by having the Clerk of the Crawford County Court mail the summons and complaint by registered mail, return receipt requested, to CASA's principal place of business in Madrid, Spain.

The service of the summons and complaint was not in compliance with the FSIA because respondent failed to follow the hierarchical order of the service of process provisions in the statute.

Section 1608(b) of Title 28 U.S.C., which is the provision in the FSIA for service on agencies or instrumentalities of foreign states, requires, first, delivery in accordance with any special arrangement with the sovereign instrumentality (§ 1608(b)(1)). If no special arrangement exists, the statute directs service by delivery to an officer or authorized agent in the United States "or in accordance with an applicable international convention on service of judicial documents" (§ 1608(b)(2)). If, however, "service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, [service can be made] by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state . . . by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served . . . ." (28 U.S.C. § 1608(b)(3)(B)).

There was no "special arrangement" with CASA regarding service under § 1608(b)(1). Thus, service was required to be effected pursuant to § 1608(b)(2). Respondent failed to effect service under that section.

Rather, respondent attempted service under § 1608(b)(3), but failed to include a Spanish translation of the summons and complaint as required by the FSIA.

On May 1, 1989, CASA removed the action to the district court pursuant to 28 U.S.C. § 1441(d) (1988) on the ground that CASA is an "agency or instrumentality of a foreign state," the Kingdom of Spain. 28 U.S.C. § 1603(b). CASA timely served its answer and pled the affirmative defenses of lack of *in personam* jurisdiction and lack of proper service of process.

Despite these interposed defenses, respondent never attempted to re-serve CASA in accordance with the FSIA. Nor did respondent seek discovery on the improper service defense or move under Rule 12(d) of the Federal Rules of Civil Procedure for an advance determination of that defense.

Respondent later encountered difficulty in complying with the district court's discovery order requiring production of an expert's written report. When respondent ultimately submitted the expert's report, it made no reference to a design or manufacturing defect by CASA. On December 11, 1991, lacking support for her allegations of liability against CASA, respondent voluntarily dismissed CASA from the action without prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

On March 27, 1991, only three months later, respondent filed a motion for leave to amend her complaint to add an action against CASA. The district court granted respondent's motion on April 9, 1991.

The summons and amended complaint were sent to CASA by the clerk of the district court on April 10, 1991, by registered mail. Once again, respondent made no attempt to comply with the hierarchical order of the service provisions in the FSIA, particularly § 1608(b)(2). Respondent also failed to serve a Spanish translation of the summons and amended complaint.

On June 3, 1991, within the time provided for answering the amended complaint, CASA moved to dismiss the action on grounds of improper service under the FSIA, contending that the district court did not have subject matter or *in personam* jurisdiction over CASA.

Respondent replied that she had substantially complied with the FSIA's service provision, 28 U.S.C. § 1608(b)(3). Respondent also argued that CASA had waived its objection to improper service by failing to assert the defense in a timely fashion.

On October 29, 1991, the district court granted CASA's motion and dismissed respondent's action against CASA because respondent failed to satisfy the service requirements of § 1608(b). (App. 14a).

As to respondent's claim that CASA waived its defense of improper service, the district court stated that "because of the [voluntary] dismissal the amended complaint and CASA's response are entitled to consideration in the context of failure to comply with the provisions of § 1608(b) without regard to the history that preceded it." (App. 13a). The district court determined that "[i]n the case of the amended complaint, CASA promptly raised its objections and the Court is obliged to consider the objections in the form

of the motion to dismiss without regard to CASA's [prior] actions . . . ." (App. 13a).

In regard to respondent's assertion that only substantial compliance with the service provisions of the FSIA is required, the district court held that "[t]he Congress has adopted a procedure for service of cases involving foreign governments and it is the view of this Court that its mandates should be followed. In sum, the Court adopts the 'strict compliance' decisions." (App. 13a).

On November 15, 1991, the district court entered a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (App. 15a).

On appeal, the Sixth Circuit agreed that CASA had not waived any objection with regard to service of the summons and amended complaint. The court reasoned that "CASA's actions in the first suit are irrelevant because a voluntary dismissal without prejudice leaves the situation as if the action had never been filed." (App. 3a).

Regarding the district court's ruling that the FSIA required strict compliance with its service provisions, the Sixth Circuit concluded that "the district court made a clear error in judgment." (App. 9a). The court held that " '[t]he better rule permits the assertion of personal jurisdiction where substantial compliance has effected actual notice.' " (App. 9a) (quoting *Obenchain Corp. v. Corporation Nacionale de Inversiones*, 656 F. Supp. 435, 437 (W.D. Pa. 1987)).

While the Sixth Circuit recognized the important policy which the translation requirement of the FSIA was designed to foster, the court commented that "in light of CASA's actual notice . . . we are reluctant

to allow procedure to triumph over substance." (App. 8a).

Judge Siler dissented on the ground that "there was no abuse of discretion on the part of the district court." (App. 9a). Judge Siler stated that the FSIA "is clear in its requirements, and makes no provision for a substantial compliance test. In particular, where a party is advised of the requirements of the Act, as the plaintiff was here, and still did not provide a Spanish translation, the district court would be justified" in dismissing the action. (App. 9a).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit in this case has rendered a decision on a federal issue in conflict with a decision of the Second Circuit in *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). *Cf. Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250 (7th Cir. 1983). Sup. Ct. R. 10.1(a).

The nature of the conflict is whether strict compliance with the service of process provisions of the FSIA is required, or whether substantial compliance is sufficient, where the defendant foreign state received actual notice of the lawsuit.

The Second Circuit in *Gray* required strict compliance. The Sixth Circuit in the case at bar required only substantial compliance. Aligned with the Sixth Circuit are the Third Circuit in *Obenchain Corporation v. Corporation Nacionale de Inversiones*, 656 F. Supp. 435 (W.D. Pa. 1987), *aff'd and order vacated in part*, 898 F.2d 142 (3d Cir. 1990), and the Eleventh

Circuit in *Harris Corporation v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982).[2]

The conflict has proliferated in the district courts. A number of district courts have held that strict compliance with the service of process provisions of the FSIA is required. *Gerritsen v. Escobar y Cordova*, 721 F. Supp. 253 (C.D. Cal. 1988); *Lippus v. Dahlgren Mfg. Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986); *Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico and Argentina*, 631 F. Supp. 821 (E.D. Pa. 1986); *Magnus Elecs., Inc. v. Royal Bank of Canada*, 620 F. Supp. 387 (N.D. Ill. 1985); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391 (E.D. Va. 1984); *40 D 6262 Realty Corp. v. United Arab Emirates Government*, 447 F. Supp. 710 (S.D.N.Y. 1978); *First City, Texas-Houston, N.A. v. Rafidain Bank*, No. 90 Civ. 7360, 1992 WESTLAW 296434 (S.D.N.Y. October 6, 1992); *Trofi v. Qantas Airways Ltd.*, No. 91-0231B (D.R.I. June 16, 1992) (unpublished opinion).

On the other hand, in a much-cited case, a district court in New York has held that substantial compli-

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[2] The Eleventh Circuit wrote, however:

> Though we find service adequate here, we admonish those seeking to invoke the FSIA to follow the service provisions it contains. Congress has carefully established a flexible framework so that American plaintiffs will have a variety of acceptable methods of service, even when relations with the foreign country in question are strained; at the same time, the framework is designed to insure that foreign defendants will get notice. There is no excuse for departure from the dictates of the statute.

Harris, 691 F.2d at 1352 n.16.

ance is sufficient if actual notice of the lawsuit is received by the defendant foreign state. *Banco Metropolitano, S.A. v. Desarrollo de Autopistas y Carreteras de Guatemala, S.A.*, 616 F. Supp. 301, 304 (S.D.N.Y. 1985).

The issue whether strict compliance is required or substantial compliance is sufficient for effective service under the FSIA is "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c).

There should be a single standard for effective service under the FSIA upon a foreign state. This unresolved issue affects all suits brought against foreign states and their instrumentalities in the United States and threatens the uniformity in the application of the FSIA intended by Congress.

In an analogous context, the Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), stated:

> By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident . . . .
>
> To promote these federal interests, Congress exercised its Art I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United

> States. The statute must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a).

491 U.S. at 493 (citations and footnotes omitted).

As the Court recognized, Congress has established a comprehensive and exclusive scheme in the FSIA by which foreign sovereigns may be amenable to suit in the United States. Courts which excuse the plain terms of the statute by accepting "substantial compliance" thwart the will of Congress and, in effect, legislate in an area left to the Congress. *See* Note, *Jurisdiction Over Foreign States for Acts of Their Instrumentalities: A Model for Attributing Liability*, 94 YALE L.J. 394, 395 (1984) ("A court that would exercise jurisdiction over a foreign state must also meet its institutional responsibilities to the coordinate branches. The judiciary must construe the FSIA in accordance with Congress' intent, and avoid provoking the foreign state to threaten United States foreign policy interests that the executive branch is charged with protecting"). There is no basis in the statute itself for a rule of substantial compliance.

The Sixth Circuit's decision in this case sharply presents this issue. Based upon the plain terms of the service of process provisions of the FSIA, service was not made in compliance with the statute. Nevertheless, the Sixth Circuit upheld the service made upon CASA because of "substantial compliance" with the statute, even though the hierarchical order of methods of service was not followed, and no trans-

lation of the summons and amended complaint was provided as required by 28 U.S.C. § 1608(b)(3).

I

THERE IS A CONFLICT BETWEEN THE SIXTH AND SECOND CIRCUITS ON WHETHER THERE MUST BE STRICT OR SUBSTANTIAL COMPLIANCE WITH THE SERVICE OF PROCESS PROVISIONS OF THE FSIA

In its opinion in this case, the Sixth Circuit held that strict compliance with the FSIA's service of process provisions was not required and that substantial compliance with the FSIA is sufficient for effective service upon a foreign state or an agency or instrumentality of a foreign state. *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (App. 1a-9a). *See also Obenchain Corp. v. Corporation Nacionale de Inversiones*, 656 F. Supp. 435, 437 (W.D. Pa. 1987) (the fact that plaintiff did not include the required notice of suit against a foreign state and served the complaint itself rather than having the clerk of the court perform the function did not result in improper service under the FSIA, where substantial compliance with the Act was achieved), *aff'd and order vacated in part*, 898 F.2d 142 (3d Cir. 1990); *Banco Metropolitano, S.A. v. Desarrollo de Autopistas y Carreteras de Guatemala, S.A.*, 616 F. Supp. 301, 304 (S.D.N.Y. 1985) (although the formalities under 28 U.S.C. § 1608(b)(3)(A) were not followed because of the absence of a translation, substantial compliance had been achieved).

In contrast, other courts, including the Second Circuit, specifically require strict compliance with the FSIA's service provisions. *Gray v. Permanent Mission of the People's Republic of the Congo to the United*

Nations, 443 F. Supp. 816 (S.D.N.Y.), *aff'd*, 580 F. 2d 1044 (2d Cir. 1978).

In *Gray*, the court dismissed plaintiff's action against the Congo Mission pursuant to Rules 12(b)(4) and (5) of the Federal Rules of Civil Procedure for ineffective service because the translation required by the FSIA had not been served. 443 F. Supp. at 822. Highlighting the importance of serving a translation, the court in *Gray* stated that service without a translation would do:

> violence . . . to the congressional concern for the difficulties inherent in cross-cultural and cross-lingual litigation which is apparent on the face of the service provisions of the [FSIA]. Every mode of service prescribed by the statute assumes either prior agreement . . . or mandates *strict attention* to the linguistic and diplomatic problems inherent in such situations. Thus, [when service is pursuant to § 1608(a)(3) and (4)] *the summons and complaint must be translated into the official language of the foreign state* . . . .

443 F. Supp. at 821 (emphasis added).

A number of district courts have similarly held that failure to comply strictly with the service of process requirements of the FSIA deprives a court of jurisdiction and requires that the action be dismissed. *See Gerritsen v. Escobar y Cordova*, 721 F. Supp. 253, 258 (C.D. Cal. 1988); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391, 395 (E.D. Va. 1984); *Trofi v. Qantas Airways Ltd.*, No. 91-0231B, slip op. at 8-9 (D.R.I. June 16, 1992). *See also LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1411-12 (E.D. Va.

1988) (failure to strictly comply with methods of service prescribed by FSIA deprived court of jurisdiction to enforce entry of default judgment); *Magnus Elecs. v. Royal Bank of Canada*, 620 F. Supp. 387, 389 (N.D. Ill. 1985) ("noncompliance with the [FSIA's] literal [service] requirements . . . deprives th[e] [c]ourt of personal jurisdiction").

Other district courts (while holding that strict compliance with the FSIA's service provisions was necessary) allowed correction of the defect in service so that the action could continue. *See Lippus v. Dahlgren Mfg. Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986); *Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico and Argentina*, 631 F. Supp. 821 (E.D. Pa. 1986); *First City, Texas—Houston, N.A. v. Rafidain Bank*, No. 90 Civ. 7360, 1992 WESTLAW 296434 (S.D.N.Y. 1992).

In contrast with the decisions requiring strict compliance, three circuits[3] (including the Sixth Circuit in the case at bar) and at least one district court have ruled that substantial compliance with the service provisions of the FSIA is sufficient, provided that the defendant foreign state receives actual notice. *See Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982); *Obenchain Corp. v. Corporation Nacionale de Inversiones*, 656 F. Supp.

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[3] The Sixth Circuit in this case discussed *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), as a substantial compliance case. (App. 4a-5a). In *Velidor*, the Court determined that effective service had been made pursuant to 28 U.S.C. § 1608(b)(2)—service upon an authorized agent of the foreign state. The Court in *Velidor*, however, made no ruling regarding the sufficiency of "substantial compliance" with the service provisions of the FSIA.

435 (W.D. Pa. 1987), *aff'd and order vacated in part*, 898 F.2d 142 (3d Cir. 1990); *Banco Metropolitano, S.A. v. Desarrollo de Autopistas y Carreteras de Guatemala, S.A.*, 616 F. Supp. 301 (S.D.N.Y. 1985). *See also* J. Dellapenna, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS, 110 (1988).

The decisions of the Sixth Circuit and the courts holding substantial compliance to be sufficient are erroneous and contrary to the Congressional will reflected in the language of the statute itself.

Like statutes governing the waiver of sovereign immunity by the United States, the FSIA, including its service of process perovisions, should be strictly construed. *See United States v. Idaho,* 61 U.S.L.W. 4437 (U.S. May 3, 1993); *Ardestani v. Immigration & Naturalization Serv.*, 112 S. Ct. 515 (1991); *Library of Congress v. Shaw,* 478 U.S. 310 (1986); *United States v. Kubrick,* 444 U.S. 111 (1979).

As the Court recently stated in *McNeil v. United States,* 61 U.S.L.W. 4468 (U.S. May 17, 1993):

> We are not free to rewrite the statutory text.
>
> ****
>
> As we have noted before, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law."

61 U.S.L.W. at 4469, 4470 (quoting *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980)).

The Court has, on several occasions, noted that the FSIA provides the sole basis for obtaining jurisdiction

over a foreign state in this country. *Saudi Arabia v. Nelson,* 113 S. Ct. 1471 (1993); *Republic of Argentina v. Weltover, Inc.,* 112 S. Ct. 2160 (1992); *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 429 (1989); *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983). In so holding, the Court has uniformly enforced the plain meaning of the language used in the statute. Only where a term was ambiguous or left undefined did the Court look beyond the language to find the intent of Congress. *See, e.g., Weltover,* 112 S. Ct. at 2165-66 (Court looked to the history of the restrictive theory of sovereign immunity to determine the intent of Congress with respect to the word "commercial" left undefined by the statute).

The FSIA's service of process provisions are clear and unambiguous. There is no legal basis in the statute or in the decisions of the Court for a judicially created rule of substantial compliance. Strict compliance with the Act's service of process provisions does not elevate form over substance. Strict compliance with the statute's service of process provisions insures that in the sensitive area of foreign relations, foreign sovereigns will be accorded equal and evenhanded treatment in the courts of this country. It also ensures that foreign states and their instrumentalities are accorded the same uniform and consistent treatment that the United States would expect in a foreign court. *See Persinger v. Islamic Republic of Iran,* 729 F.2d 835, 841 (D.D.C. 1984) (foreign states "base their sovereign immunity decisions on reciprocity [and] parity of reasoning").

In sum, the decision of the Sixth Circuit in this case that substantial compliance with the FSIA is

sufficient for effective service is in conflict with a decision of the Second Circuit and the majority of federal district courts which have almost uniformly held that strict compliance with the statute is necessary for effective service under the FSIA.

II.

THE ISSUE WHETHER STRICT OR SUBSTANTIAL COMPLIANCE IS REQUIRED FOR EFFECTIVE SERVICE UNDER THE FSIA IS AN IMPORTANT QUESTION WHICH SHOULD BE SETTLED BY THIS COURT

As this Court noted in *Verlinden*, "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." 461 U.S. at 493. The FSIA was designed "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.' " *Id.* at 488 (citation omitted). *See also* H.R. REP. No. 94-1487, 94th CONG., 2d SESS., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6605-06 (listing the various purposes for the enactment of the FSIA).

In particular, one of the stated purposes of the FSIA was to provide "for the first time in U.S. law . . . a statutory procedure for making service [of process] upon, and obtaining in personam jurisdiction over, a foreign state." H.R. REP. 94-1487, *supra*, at 6606. Indeed, "Section 1608 sets forth the exclusive procedures with respect to service on . . . a foreign state or its . . . agencies or instrumentalities . . . [and is] intended . . . to insure that private persons have adequate means for commencing a suit against a for-

eign state to seek redress in the courts." *Id.* at 6622. These service of process provisions establish a comprehensive set of rules with different methods of service for a variety of circumstances arranged in a hierarchical order. *See id.* at 6623-25. *See also* J. Dellapenna, *supra*, at 111.

This hierarchical order was established deliberately and in accordance with national policy concerns. Through Sections 1608(a)(1) and (2) and (b)(1) and (2), Congress had hoped to promote contractual or consensual service arrangements, and the adoption and use of international service conventions. *See* H.R. REP. 94-1487, *supra*, at 6623. Congress set forth clearly that two methods of service were preferred. The remaining, alternative method of service, § 1608(b)(3), was not to be used unless (b)(1) and (b)(2) were unavailable or unavailing. *See* George, *A Practical and Theoretical Analysis of Service of Process under the Foreign Sovereign Immunities Act*, 19 INT'L LAW. 49, 55 (1985). *See also Lippus*, 644 F. Supp. at 1478-79 ("Subsection (b)(3) is the service of last resort under the FSIA").

Strict compliance with both the hierarchical order and terms of each method of service provided by Congress is necessary to assure fairness and uniformity. "[T]olerating less than full compliance [however] threatens the uniformity of results that Congress sought to achieve and risks the type of foreign relations complications that Congress sought to eliminate when passing the statute." George, *supra*, at 61.

In its opinion in this case, the Sixth Circuit commented that questions regarding strict or substantial compliance with the FSIA's service provisions were inconsequential when a foreign state or instrumentality received actual notice of an action. (*See* App. 8a-9a). Under the FSIA, however, only when service

is accomplished by one of the methods prescribed in § 1608 does actual notice become an issue. *See* H.R. REP. No. 94-1487, *supra*, at 6612 (due process requirement of adequate notice is achieved by proper service under § 1608). What a foreign state or an agency or instrumentality of a foreign state learns subsequent to the receipt of service of process is irrelevant because "informal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements." *Gray*, 443 F. Supp. at 821. *See also First City*, No. 90 Civ. 7360, 1992 WESTLAW 296434 at 2 (that defendant foreign state may have been aware of the lawsuit "is of little import").[4]

The conflict which presently exists between the Circuits on whether strict or substantial compliance is necessary for effective service under the FSIA threatens the uniform treatment of foreign states and their agencies and instrumentalities in courts in the United States which the FSIA was designed to ensure. *See* H.R. REP. 94-1487, *supra*, at 6606.

There should be only one position in the United States on the issue whether strict or substantial compliance is required for effective service under the FSIA. To establish this uniformity, the conflict should be resolved by this Court.

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[4] For example, that CASA "made a . . . motion to dismiss the amended complaint . . . is represented by an American law firm and has filed [papers] . . . in English "(App. 8a), is irrelevant and immaterial to the issue of service in compliance with the FSIA.

CONCLUSION

For the reasons set forth above, petitioner urges that this petition for writ of certiorari be granted.

Respectfully submitted

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-4190

DIERDRE M. SHERER,
Administratrix of the Estate
of DAVID W. SHERER, Deceased,
Plaintiff-Appellant,

v.

CONSTRUCCIONES AERONAUTICAS, S.A.,
a Foreign Corporation,
Defendant-Appellee.

Decided and Filed March 2, 1993

On Appeal from the United States District Court for the Northern District of Ohio

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Before: JONES and SILER, Circuit Judges; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. SILER, Circuit Judge (p. 10), delivered a separate dissenting opinion.

PECK, Senior Circuit Judge. This action arises from a plane crash in March 1987 in which Appellant Dierdre Sherer's decedent was killed. Construcciones Aeronauticas, S.A. (CASA), the manufacturer of the plane, is a Spanish corporation which is largely owned by the Spanish government. As such, it is an "agency or instrumentality of a foreign state" for purposes of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1608. Under the FSIA, unless there is a special agreement between the parties,

an authorized agent in the United States, or an applicable international convention, the plaintiff must arrange for the clerk of court to send a copy of the summons and complaint "together with a translation of each into the official language of the foreign state" to the foreign defendant. 28 U.S.C. § 1608(b)(3).

On March 6, 1989, Sherer filed suit against CASA in state court. CASA was served with the summons and complaint via registered mail without a Spanish translation. On May 1, 1989, CASA removed the action to federal court. On May 3, 1989, CASA filed its answer asserting twenty-one affirmative defenses including lack of personal jurisdiction and improper service. The answer was in English and was prepared by attorneys in the United States. Attorneys for CASA attended status calls and engaged in motions practice and discovery. Sherer apparently encountered difficulty in complying with the district court's order regarding disclosure of the identity of her experts and a written report by the experts. On August 17, 1990, Sherer produced her report. Thereafter Sherer dismissed several parties without prejudice. CASA was dismissed on December 11, 1990.

On March 27, 1991, Sherer filed a motion for leave to amend her complaint to recommence her action against CASA. After a hearing on April 8, the district court granted the motion and the amended complaint was filed the next day. The summons and amended complaint were sent to CASA without a Spanish translation. CASA responded with a motion to dismiss for improper service because a Spanish translation did not accompany the summons and complaint. Sherer opposed the motion arguing, *inter alia*, that she had "substantially complied" with FSIA's service requirements and that CASA had waived its objection to improper service because of its earlier participation in the case.

On October 29, 1991, the district court granted CASA's motion to dismiss. The court reasoned that because CASA had been dismissed earlier and promptly raised its objection to the amended complaint, CASA's objection was entitled to consideration "without regard to the history that preceded it." Mem. Op. at p. 6. The district court also rejected the reasoning of decisions which had denied motions to dismiss on the basis of substantial compliance with the FSIA and adopted the position that strict compliance with the service provisions of the FSIA was required. Pursuant to Sherer's FRCP 54(b) motion, the district court entered final judgment for CASA. This appeal followed.

ANALYSIS

It is well established that in cases involving improper service, courts have broad discretion to dismiss the action. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1354 at 288 (2d ed. 1987). Thus we review this case under an abuse of discretion standard. We note that:

> 'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

Balani v. Immigration & Naturalization Service, 669 F.2d 1157 (6th Cir. 1982) (citations omitted).

With regard to the waiver issue, CASA's actions in the first suit are irrelevant because a voluntary dismissal without prejudice leaves the situation as if the action had never been filed. *Hall v. Kroger Baking Co.*, 520 F.2d 1203, 1205 (6th Cir. 1975); *Kington v. United States*, 396 F.2d 9, 10 (6th Cir.), *cert. denied*, 393 U.S. 960 (1968); *Bomer v.*

Ribicoff, 304 F.2d 427 (6th Cir. 1962); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2367 at 186 (2d ed. 1987). CASA's motion to dismiss the amended complaint for improper service was timely filed. Thus, we agree with the district court that CASA has not waived any objection with regard to service of the amended complaint.

Whether Sherer has substantially complied with the service requirements of the FSIA is a more complex issue. As the district court noted, whether the § 1608(b) requirement that a translation accompany the complaint and summons is mandatory is an issue of first impression in this circuit. Some courts that have considered this issue have required strict compliance with the FSIA, while others have found substantial compliance with the FSIA to be sufficient.

The Eleventh Circuit addressed the issue in *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982) and found service to be sufficient despite noncompliance with FSIA service requirements. The court recognized that Congress had established a flexible framework of acceptable methods of service to assure that foreign defendants will get notice. *Id.* at 1352 n.16. The court noted that the foreign defendant challenged service only on the grounds of noncompliance with FSIA requirements and did not deny that it had notice of the action. *Id.* at 1352. While the court admonished litigants to follow FSIA service requirements, *id.* at n. 16, it concluded that "[t]he failure to follow precisely those steps in § 1608 designed to insure that actual service be made should not override and invalidate the fact that in this case notice was actually received." *Id.* at 1352.

In *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3rd Cir. 1981), *cert. denied*, 455 U.S. 929 (1982), the Third Circuit also concluded that actual notice was more important than strict compliance with the technical requirements of the

FSIA. In that case, seaman brought an action against a ship and an instrumentality of Algerian and Libyan governments who owned the ship. The plaintiffs served the ship's master. The issue then was whether the master of a ship is an agent for purposes of receiving process under the FSIA. The court looked to the congressional intent in enacting § 1608 of the FSIA and opined:

> Rather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign entities. In addition, Congress wished to insure that the sovereign owner would receive actual notice. H.R. Rep. No. 94-1487 at 23-24.

Since the officers of the company owning the ship received immediate notice of the suit after service on the ship's master, the court concluded that service was sufficient under the FSIA.

The district court in *Banco Metropolitano v. Desarrollo de Autopistas*, 616 F. Supp. 301 (S.D.N.Y. 1985), reached a similar conclusion. In that case as in this one, the plaintiff failed to serve a translation on the defendants. The court ruled that because the foreign defendant had actual knowledge of the summons and complaint, substantial compliance with the FSIA had been achieved. *Id.* at 304.

Similarly in *Obenchain Corp. v. Corporation Nacionale de Inversiones*, 656 F. Supp. 435 (W.D. Pa. 1987), *aff'd in part and rev'd in part*, 898 F.2d 142 (3rd Cir. 1990), the plaintiff served the complaint rather than having the clerk of courts do it and also failed to include the required notice of suit. The court acknowledged that some courts have required strict compliance with the requirements of the FSIA. However, the court concluded that despite technical omissions where substantial compliance with the FSIA had resulted in actual notice, the purpose of the FSIA was satisfied. *Id* at 437.

The district court in this case, rejected the "substantial compliance" cases and adopted the "strict compliance" cases, citing *Lippus v. Dahlgren Manufacturing Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986) and *Gray v. Permanent Mission*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978). In *Lippus*, the plaintiffs failed to supply a translation of the summons and complaint. The court held the service to be defective, noting the difficulties imposed on a defendant who is served with legal documents in a foreign language. *Id.* at 1478-79. However, the court also observed that in enacting § 1068(b)(3), Congress intended the foreign government to be apprised of the pendency of the lawsuit through service "reasonably calculated to give actual notice . . . ." 28 U.S.C. § 1608(b)(3). In light of the defendant's actual notice of the suit and participation in the suit, the court decided that the letter and spirit of the FSIA would best be served by allowing the plaintiff thirty days in which to perfect service. *Id.* at 1479. The court noted that service defects are readily curable and that such a solution would entail "little tangible prejudice" to the defendant. *Id.*

Other courts have also concluded that strict compliance was necessary, but allowed correction of the defect so that the suit could continue. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, No. 90 Civ. 7360, 1992 U.S. Dist. LEXIS 15235 at *8 (S.D.N.Y. Oct. 6, 1992) (service under FSIA ineffectual, but court gave plaintiff reasonable time to effect service rather than dismiss case); *Lucchino v. Foreign Countries*, 631 F. Supp. 821, 827 (E.D. Pa. 1986) (service which did not conform to the FSIA was insufficient, but dismissal was stayed for 20 days to allow plaintiff to make proper service); *Magnus Electronics, Inc. v. Royal Bank*, 620 F. Supp. 387, 389 (N.D. Ill. 1985), *aff'd in part, rev'd in part*, 830 F.2d 1396 (7th Cir. 1987) (noncompliance with literal requirements of FSIA deprived court of jurisdiction; service defect was curable, but subject matter jurisdiction was lacking).

In *Gray*, the Congo's permanent mission to the United Nations purchased a building in New York City. When a dispute arose regarding payment, the plaintiff commenced a suit against the Congo Mission by serving a summons and complaint on the defendant's secretary. 443 F. Supp. at 818. The summons and complaint was in English and was not accompanied by a translation. *Id.* at 821. In finding the service to be insufficient, the court noted that "the officials of the Congo Mission did not understand their rights under American law, for they did not employ attorneys nor take any other legal actions until threatened with impending eviction . . . ." *Id.* The court concluded that "[t]he plaintiff's failure to comply with the explicit service requirements of the statute meant that the Congo Mission did not receive the requisite notice of the action against it." *Id.* at 820.

Finally, in *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391 (E.D. Va. 1984), the court concluded that service on the Secretary of the Commonwealth of Virginia as statutory agent for nonresident persons was insufficient service where the foreign instrumentality had no contacts with the state. In adopting its "strict compliance" position, the court stated "[i]n light of this strong public policy articulated by Congress to insure adequate notice in litigation against a foreign state, this Court is directed to strictly interpret the requirements set forth in § 1608(b)." *Id.* at 395.

The common theme running through the vast majority of these cases, whether "substantial compliance" or "strict compliance," is the importance of actual notice to the defendants. *Contra, First City, supra* at *5 (that defendant may have been aware of the lawsuit was of little import). The "substantial compliance"cases reason that a technical defect in service should not override the fact that the defendant received actual notice. The "strict compliance" cases assert the proposition that actual notice is best in-

sured by rigid compliance with the literal requirements of the FSIA.

In *Gray*, the plaintiff's failure to serve a translation on the defendants resulted in a lack of actual notice to the Congolese officials as demonstrated by their inaction until they were threatened with eviction. Under such circumstances the purpose of the FSIA is not served and the court properly dismissed the case for insufficient service. Similarly, in *Unidyne, supra*, dismissal of the action was proper where service on the secretary of the Commonwealth of Virginia was not sufficient to insure actual notice to an Argentinean airline where the airline had no contacts with the state. In *Lippus* and *Lucchino, supra*, the courts acknowledged that actual notice had been received and allowed the plaintiff time in which to perfect service. In *Magnus, supra*, the court noted that the service defect was curable, but went on to find that it did not have subject matter jurisdiction in the case. Thus, while requiring strict compliance with the requirements of the FSIA, where actual notice was received and no other defect existed these courts allowed the cases to go forward on the merits after the improper service was remedied.

Here there can be no doubt that CASA had actual notice of the suit. Even setting aside its participation in the original suit, CASA made a timely motion to dismiss the amended complaint and has not denied that it had actual notice. Furthermore, CASA can show no prejudice resulting from the lack of a translation. CASA is represented by an American law firm and has filed all its responses and reports regarding the accident in English. We recognize the important policy which the translation requirement safeguards. However in light of CASA's actual notice and lack of prejudice, we are reluctant to allow procedure to triumph over substance. Furthermore, we note that this is an action for wrongful death. As the court in *Banco Metropolitano* stated "[g]iven the nature of the issues presented and the problems intended to be addressed by the

FSIA, strict enforcement of its technicalities here would be inappropriate." 616 F. Supp. at 304. Accordingly, we agree with the court in *Obenchain* which stated:

> [T]he better rule permits the assertion of personal jurisdiction where substantial compliance has effected actual notice. The purpose of the Act's requirements is to ensure actual notice to foreign states of the fact and substance of pending litigation. Where a party has received such notice, despite technical omissions in the manner of service, the purpose of the Act if not its letter has been satisfied.

656 F. Supp. at 437. (Citations omitted).

Thus we conclude that the district court made a clear error in judgment in adopting the "strict compliance" decisions under the circumstances of this case. Accordingly, we reverse the district court's judgment and remand for further action consistent with this decision.

SILER, Circuit Judge, dissenting. I respectfully dissent from the majority opinion, as I find there was no abuse of discretion on the part of the district court. I would affirm.

As the majority opinion indicates, there is a split of authority on the issue of whether there should be strict compliance or substantial compliance with the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608. However, the statute is clear in its requirements, and makes no provision for a substantial compliance test. In particular, where a party is advised of the requirements of the Act, as the plaintiff was here, and still did not provide a Spanish translation, the district court would be justified in following the authority in *Lippus v. Dahlgren Manufacturing Co.*, 644 F. Supp. 1473 (E.D.N.Y. 1986), and *Gray v. Permanent Mission*, 443 F.Supp. 816 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), without abusing its discretion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:89 CV 0821

Dierdre M. Sherer,
Administratrix of the Estate
of David W. Sherer, Deceased,

Plaintiff,

vs.

Hartzell Propeller, Inc.,

Defendant.

MEMORANDUM OPINION

The defendant Construcciones Aeronauticas, S.A. ("CASA") filed a motion to dismiss on June 3, 1991 (Docket #74) on the claim that the plaintiff had failed to obtain subject matter or *in personam* jurisdiction over CASA because the service of process on CASA, an agency or instrumentality of a foreign state, i.e. Spain, failed to meet the strict provisions for such service as outlined by 28 U.S.C. § 1608(b).[1]

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[1] 28 U.S.C. § 1608(B) states as follows:

Service in the courts of the United States and of the states shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable in-

(continued . . .)

The plaintiff filed a brief in opposition to the motion (Docket #76) and CASA responded with an additional brief and affidavit in support of the motion.[2]

In support of its claim of failure of compliance with the provisions of § 1608(b), CASA asserts that the summons and complaint were not accompanied by a Spanish translation as required by § 1608(b)(3). No factual dispute exists as to that omission.

Before analyzing the result of the failure to include a Spanish translation, a brief recitation of the history of this litigation is appropriate.

The lawsuit arises from the fatal airplane crash in Michigan on March 4, 1987 in which the plaintiff's decedent was killed. The airplane was manufactured by CASA. The lawsuit was filed on March 6, 1989 in the Common Pleas

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(continued . . .)

> ternational convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--
>
> (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
>
> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
>
> (C) as directed by order of the court consistent with the law of the place where service is to be made.

28 U.S.C. § 1608(b).

[2] The affidavit served the purpose of demonstrating that CASA was, despite the plaintiff's challenge raised in her response, an agency or instrumentality of Spain in that the government of Spain owned over 50% of the stock of CASA at the time of the fatal airplane crash that gives rise to this litigation sounding in product liability.

Court of Crawford County and then removed to this Court on May 1, 1989 by CASA. CASA filed its answer on May 3, 1989 and asserted a lack of proper service.

Subsequently, the plaintiff encountered difficulty in complying with the Court's order regarding disclosure of the identity of plaintiff's expert or experts on the issue of liability which included the publication and delivery to defendants' counsel of the written report of liability experts. Eventually, the Court published an order indicating that the plaintiff's case would be dismissed with prejudice unless the plaintiff produced a report of its liability expert by August 16, 1990. On August 17, 1990 the plaintiff produced the report. Thereafter, the plaintiff dismissed several parties without prejudice including CASA. CASA was dismissed on December 11, 1990.

On March 27, 1991, the plaintiff filed a motion for leave to amend her complaint so as to recommence the action against CASA on the assertion that new data suggests that CASA is a necessary party. Following a hearing on April 8, 1991, the Court granted the plaintiff's motion and her amended complaint was filed on April 9, 1991. As in the case of service instituted in the Crawford County Common Pleas Court, service was by registered mail and did not include the Spanish translation. The renewed service was apparently received by CASA's legal department on May 10, 1991 and the motion to dismiss for failure of service followed.

The plaintiff's brief in opposition to the motion to dismiss submits three reasons why the motion should be denied. First, the plaintiff claims that there is no showing that CASA is an agency or instrumentality of Spain bringing into consideration the provisions of § 1608(b). Secondly, and assuming the application of § 1608(b), the plaintiff asserts that it has "substantially complied" with § 1608(b). Thirdly, plaintiff asserts that CASA waived its objection to improper service by not asserting it in a timely fashion.

Initially, the Court finds that CASA has demonstrated that it is entitled to the protections of § 1608(b) by the affidavit of Carlos Blanco attached to CASA's reply of July 9, 1991 (Docket #78).

The plaintiff's defense of waiver based on CASA's failure to advance in timely fashion the objections relating to service would prompt consideration if the plaintiff had not dismissed CASA on December 11, 1990. However, because of the dismissal the amended complaint and CASA's response are entitled to consideration in the context of failure to comply with the provisions of § 1608(b) without regard to the history that preceded it. In the case of the amended complaint, CASA promptly raised its objections and the Court is obliged to consider the objections in the form of the motion to dismiss without regard to CASA's actions prior to the plaintiff's voluntary dismissal of CASA.

The issue of whether the § 1608(b) requirement of the foreign translation is mandatory is apparently new to this circuit. Other courts have wrestled with the issue of compliance and some courts have denied motions to dismiss on the basis of a finding of "substantial compliance." *E.g., Banco Metropolitano v. Desarrollo de Autopistas*, 616 F. Supp. 301, 304 (S.D.N.Y. 1985); *see also Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1352 (11th Cir. 1982). The Court has examined the cases submitted by the plaintiff and does not find the reasoning compelling. The Congress has adopted a procedure for service of cases involving foreign governments and it is the view of this Court that its mandates should be followed. In sum, the Court adopts the "strict compliance" decisions. *E.g., Lippus v. Dahlgren Manufacturing Co.*, 644 F. Supp. 1473, 1478-79 (E.D.N.Y. 1986); *see also Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816, 821 (S.D.N.Y.), *aff'd* 580 F.2d 1044 (2d Cir. 1978).

The Court finds that the motion of CASA to dismiss for failure of service should be granted.

CASA makes the additional argument that this Court should dismiss the plaintiff's action on the basis that the statute of limitations has not been tolled; that the Michigan three-year statute of limitations applies and that by virtue of a dismissal for failure of service and the fact that the Michigan statute is for only three years, plaintiff's action against CASA is now barred by the statute of limitations and this Court should so declare. CASA fails to address the question of how this Court has jurisdiction to rule on the application of the statute of limitations to CASA if CASA is not properly before the Court. In the Court's view, such a declaration would be on the order of an advisory opinion. The Court does not have the time, energy or jurisdiction to render advisory opinions.

Accordingly, the motion to dismiss of defendant Construcciones Aeronauticas, S.A. is hereby granted. The Court will delay entering an Order in this matter until after the status conference scheduled for October 31, 1991, wherein it will discuss with the parties the advisability of entering a final judgment pursuant to Fed. R. Civ. P. 54(b).

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:89 CV 0821

Dierdre M. Sherer,

Plaintiff,

vs.

Construcciones Aeronauticas, S.A., et al.,

Defendants.

MEMORANDUM OPINION

On October 31, 1991, this Court granted the motion to dismiss of defendant Construcciones Aeronauticas, S.A. ("CASA") on the ground of failure of service. Plaintiff Dierdre M. Sherer ("Sherer") has filed a motion for Rule 54(b) certification (Docket No. 85). For the reasons set forth below, that motion is granted.

I. Factual Background

This lawsuit arises from a fatal airplane crash in Detroit, Michigan on March 4, 1987, wherein the plaintiff's decedent, David W. Sherer, was killed. On March 6, 1989, Sherer filed a wrongful death action in the Crawford County Court of Common Pleas, naming as defendants CASA, a Spanish corporation which manufactured the airplane, and Hartzell Propeller, Inc. ("Hartzell"), an Ohio corporation. Sherer alleged causes of action based upon negligence, breach of expressed and implied warranties, and strict liability. She also alleged that the aircraft was defectively designed and constructed.

On May 1, 1989, CASA, the foreign defendant, removed the action to this Court pursuant to 28 U.S.C. § 1441(d). Although CASA was dismissed without prejudice on De-

cember 11, 1990, it was brought back into the action when Sherer was granted leave to file an amended complaint based on new information. Service was attempted on CASA; however, this Court granted CASA's motion to dismiss for failure of service. Because dismissal of CASA would divest this Court of jurisdiction, entry of an Order was delayed pending consideration of the advisability of entering a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

II. Rule 54(b) Certification

Rule 54(b) of the Federal Rules of Civil Procedure provides that:

> (b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

Rule 54(b) was enacted as "a response to the need created by the liberal joinder provisions of the Federal Rules of Civil Procedure to revise 'what should be treated as a judicial unit for purposes of appellate jurisdiction.' " *Cor-*

rosioneering v. Thyssen Environmental Systems, 807 F.2d 1279, 1282 (6th Cir. 1986) (citation omitted). The Rule " 'attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties.' " *Id.* (citations omitted). The determination of whether to allow for an appeal pursuant to Rule 54(b) is a matter left to the discretion of the district court. *Id.*

The Rule itself states that the district court must find that there is no just reason for delay of the appeal. Fed. R. Civ. P. 54(b). However, the Sixth Circuit has indicated that in order to avoid a finding of abuse of discretion in the certification of an appeal pursuant to Rule 54(b), the "district court should do more than just recite the Rule 54(b) formula 'of 'no just reason for delay.' " *Id.*; *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 61 (6th Cir. 1986). As the Supreme Court explained in *Protective Committee v Anderson*, 390 U.S. 414 (1968):

> It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.

Id. at 434.

In *Corrosioneering, supra*, the Sixth Circuit set forth the following "nonexhaustive list" of factors to consider:

> (1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result

> in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like. Depending upon the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final under Rule 54(b).

Corrosioneering, 807 F.2d at 1283 (quoting *Allis-Chambers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3rd Cir. 1975)).

III. Discussion

It appears that immediate appeal would be appropriate in this case. The issue regarding whether plaintiff failed to obtain service upon CASA is separate and distinct from those issues which would be presented if and when this case were tried.

Because defendant Hartzell is an Ohio corporation, this Court could remand what remains of this action to the state court in which it was originally filed. In the meantime, Sherer could take her appeal against CASA. The plaintiff would then be faced with an appeal of this Court's ruling plus a full-blown trial against Hartzell in state court. Regardless of the result in state court, the need for a second trial would remain, should plaintiff prevail in her appeal. Such trial would require virtually the same trial preparation and evidence, as well as many of the same witnesses, as does an action against Hartzell alone. Further, if the state court were willing to stay the action pending outcome of the federal appeal, it is possible that plaintiff might prevail on appeal and then be faced with pursuing essentially the same action in two forums, one federal and one state.

In summary, this case meets the criteria set forth in *Corrosioneering*. First, the issue of failure of service is

distinct from the issue of liability. Second, there is no chance that the need for review would be mooted by a resolution of Sherer's claim against Hartzell, since the issue appealed is a procedural one, whereas the issues as to Hartzell deal with liability. Third, there is no chance that the reviewing court will have to consider the issue of service twice since there is no claim that Hartzell was not properly served. Fourth, the potential for undue prejudice, hardship and injustice to Sherer is considerable if an immediate appeal is not granted. Fifth, the interests of judicial economy are better served by an immediate appeal.

Accordingly, the Court finds that entry of final judgment in favor of CASA and against Sherer pursuant to Rule 54(b) is warranted. Further, a decision regarding whether to remand the remaining issues to state court is stayed pending the outcome of Sherer's appeal on the issue of failure of service on CASA.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

The Foreign Sovereign Immunities Act
28 U.S.C. § 1608(a), (b), (c)

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services — and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

Supreme Court, U.S
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No. 92-1888

In The

Supreme Court of the United States

October Term, 1992

CONSTRUCCIONES AERONAUTICAS, S.A., a Foreign Corporation,

Petitioner,

vs.

DIERDRE M. SHERER, Administratrix of the Estate of David W. Sherer, deceased,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a corporate defendant, which is an instrumentality of a foreign sovereign, should be dismissed from an action because of a technical defect in service of process, where it is undisputed that the defendant was served with the summons and complaint, understood the nature of the action when the complaint was served, and has not suffered any prejudice as a result of the method of service.

STATUTES INVOLVED

This case involves the application of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* (1988), and specifically the FSIA's provision regarding service of process on an instrumentality of a foreign sovereign, 28 U.S.C. § 1608(b) (1988). Section 1608(b) of the FSIA is reprinted in the appendix to the petition.

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Petitioner,

vs.

DIERDRE M. SHERER, Administratrix of the Estate of David W. Sherer, deceased,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This wrongful death/product liability action arose out of an airplane crash that occurred on March 4, 1987, at the Detroit Metropolitan Airport. Nine persons were killed in the crash, including respondent's husband, David Sherer. The airplane was manufactured by petitioner, Construcciones Aeronauticas, S.A. ("CASA"). As a result of the March 4, 1987 tragedy, at least ten lawsuits were filed.

Respondent filed her lawsuit against CASA on March 3, 1989, in the Court of Common Pleas, Crawford County, Ohio. CASA was served as a foreign defendant pursuant to Rule 4.5 of the Ohio Rules of Civil Procedure, which is substantially identical to Rule 4(i) of the Federal Rules of Civil Procedure. The clerk of courts mailed the summons and complaint, via registered mail, return receipt requested, to CASA's principal place of business.

Approximately sixty days after the complaint was filed, petitioner removed the action to federal court and served its answer to respondent's complaint. The answer raised twenty one affirmative defenses, including lack of personal jurisdiction, misuse or alteration of the aircraft, lack of proximate cause, comparative negligence, a claim for indemnity from other persons or parties, lack of capacity by plaintiff to bring the action, lack of privity between plaintiff and CASA, the running of applicable statutes of limitations, improper service of process, and lack of subject matter jurisdiction.

Over the course of the litigation that ensued, petitioner attended three status calls, and twice moved for dismissal of the action for reasons other than insufficient service of process or lack of personal jurisdiction.

Petitioner also participated in discovery. CASA served respondent with interrogatories and requests for production of documents, which respondent answered, and requests for admissions. Respondent and petitioner entered into a stipulation of confidentiality of documents produced by CASA. Although the action was pending for over twenty-one months, petitioner did not, at any time after answering the complaint, raise with the court the issues of service of process or lack of personal jurisdiction.

On December 11, 1990, petitioner agreed to allow respondent to dismiss the action without prejudice pursuant to Rule 41(a)(1) of

the Federal Rules of Civil Procedure. Ohio substantive law provided respondent one year in which to refile her claim.

Upon discovering new information which indicated that CASA was a proper party to the lawsuit, respondent moved for and was granted leave to file an amended complaint renaming petitioner as a defendant. On April 10, 1991, respondent filed her amended complaint, and petitioner was served as it had been previously; the summons and amended complaint were sent via registered mail, return receipt requested, to CASA's principal place of business. It is undisputed that CASA's legal department received the amended complaint on May 6, 1991.

On June 3, 1991, more than two years after respondent commenced this lawsuit, and after the applicable statute of limitation would have run if not tolled, petitioner filed a motion to dismiss this action for insufficient service of process and lack of personal jurisdiction. In its motion, petitioner argued that dismissal was proper because respondent had failed to comply with the technical requirements of the FSIA in that respondent had failed to serve a Spanish translation of the complaint.[1] Not only was it undisputed that petitioner received actual notice of the lawsuit, but in fact CASA did not even allege that it had suffered any prejudice by respondent's omission.

In her brief in opposition, respondent argued that the purpose of the FSIA, to ensure that actual notice of the action is received by the foreign defendant, was achieved, and that dismissal was improper under the circumstances. Respondent also argued that

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1. Petitioner now claims that service was improper because "respondent failed to follow the hierarchical order of the service of process provisions in the statute." (Petition at 3). Petitioner failed to raise this alleged defect in service in either the district court, or the Sixth Circuit Court of Appeals, and accordingly, has waived the right to so argue to this Court.

CASA had waived any defect in the method of service through its participation in lawsuit. Nevertheless, on October 29, 1991, the district court dismissed petitioner from this action. The Sixth Circuit reversed the district court, concluding that service was sufficient and personal jurisdiction was attained.

REASONS FOR DENYING THE WRIT

Petitioner's argument that a conflict exists in the lower courts relies entirely upon the dicta of the decisions that it cites and fails to acknowledge the varying facts and circumstances of each case. A review of those decisions confirms that the alleged conflict is simply illusory; in those actions in which the undisputed facts establish that the defendant received actual notice of the lawsuit and suffered no prejudice by the plaintiff's technical deficiency in the method of service, courts have consistently denied the defendant's motion to dismiss the action. Furthermore, where courts have found that service was insufficient but the defect was readily curable, they have refused to dismiss the action and instead have afforded the plaintiff time to reserve the defendant. Courts have dismissed actions for insufficient service under the FSIA where the defendant failed to receive timely notice, and/or suffered prejudice by the defect in service.

In deciding that the district court erred in dismissing CASA from this action, the Sixth Circuit Court of Appeals carefully analyzed the holdings of the federal courts that had ruled on this issue. The Sixth Circuit correctly noted that the common theme throughout those decisions, whether they purported to adopt the "strict compliance" or the "substantial compliance" standard, "is the importance of actual notice to the defendants." *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (App. 7a).

Although petitioner participated in this litigation for over one

and one-half years, and concedes that it suffered absolutely no prejudice by respondent's failure to serve a translated complaint, petitioner seeks to avoid adjudication on the merits in this wrongful death action due to a technical defect in service that could have been readily cured had the district court afforded respondent time to do so. Petitioner's position is inconsistent with the weight of authority and the policy behind the FSIA and does violence to the clear mandate of this Court that, whenever possible, cases should be resolved on the merits rather than procedural technicalities.

I.

THERE IS NO REAL CONFLICT IN THE LOWER COURTS REGARDING THE APPLICATION OF THE SERVICE REQUIREMENTS OF THE FSIA.

Petitioner contends that a conflict exists between the courts that seemingly require strict compliance with the FSIA, and those that hold that substantial compliance with the Act is sufficient where the defendant receives actual notice of the lawsuit and suffers no prejudice by the technical deficiency in service. In support of its contention, petitioner lists cases from district courts in the Second, Fourth, and Ninth Circuits as requiring strict compliance with the FSIA's service provisions, and circuit court opinions of the Third, Sixth, and Eleventh Circuits as requiring only substantial compliance. A review of the cases cited by petitioner reveals that there is no true conflict in the decisions of these courts.

For example, petitioner cites *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978) as requiring strict compliance with the service requirements of the FSIA. In *Gray*, however, the court did not dismiss the action

because the plaintiff failed to "strictly comply" with the FSIA, but rather because "the plaintiff's failure to comply with the explicit service requirements of the statute meant that the Congo Mission did not receive the requisite notice of the action against it." *Id.* at 820.

In *Gray*, dismissal would have been appropriate regardless of whether the court adopted the so-called "strict compliance" or the "substantial compliance" standard. The Congolese Mission had been served with a summons and complaint in English, which was not accompanied by a translation. The Mission did not answer the complaint, and the plaintiff subsequently obtained a default judgment in state court, successfully prosecuted a foreclosure action, purchased the property at the foreclosure sale, and initiated proceedings to have the Congolese evicted from the property. It was not until the latter action was taken by the plaintiff that the defendant obtained legal counsel in the United States. The defendant then removed the action to federal court and moved for dismissal, arguing that the plaintiff's failure to comply with the FSIA rendered service fatally defective.

In dismissing the action, the district court explained:

> It is obvious that the officials of the Congo Mission did not understand their rights under American law, for they did not employ attorneys nor take any other legal actions until threatened with impending eviction at the hands of the "sheriff of the County of New York."

Id. at 821. The Second Circuit affirmed *Gray* without opinion at 580 F.2d 1044 (2d Cir. 1978).

Subsequent to the decision of the Second Circuit in *Gray*,

district courts within the circuit have had numerous opportunities to consider the proper application of the service requirements of the FSIA. The courts have consistently held that dismissal is an improper remedy for a defendant who complains of a technical deficiency in service, if actual notice of the action is received and the defendant admittedly suffers no prejudice due to the deficiency.

In *Banco Metropolitano v. Desarrollo de Autopistas,* 616 F. Supp. 301 (S.D.N.Y. 1985), the court noted that because the defendant received actual knowledge of the summons and complaint, and substantial compliance with the FSIA had been achieved, it would be inappropriate to dismiss the action due to the plaintiff's technical noncompliance with the Act.

Where the defect in service can be readily cured without prejudice to the defendants, courts in the Second Circuit have granted the plaintiff leave to do so. For example, in *40 D 6262 Realty Corporation v. United Arab Emirates Government,* 447 F. Supp. 710 (S.D.N.Y. 1978), the court found that the plaintiff's method of service did not comply with the FSIA, but rather than dismiss the action, the court afforded the plaintiff the opportunity to reserve the defendant in accordance with the Act. Similarly, in *Lippus v. Dahlgren Mfg. Co.,* 644 F. Supp. 1473 (E.D.N.Y. 1986), the court ordered that plaintiff reserve the defendant, rather than grant the defendant's motion to dismiss, where service was held to be insufficient under the FSIA.

Finally, in an unreported decision, a district court in the Second Circuit dismissed a default judgment because the plaintiff had failed to comply with the service requirements of the FSIA when the underlying action was filed. In *First City, Texas Houston, N.A. v. Rafidain Bank,* No. 90 Civ. 7360, 1992 WL 296434 (S.D.N.Y. October 6, 1992), there was no finding that the defendant had received actual notice of the lawsuit, and the fact that the plaintiff obtained a default judgment indicated that the defendant was prejudiced by the deficiency in service.

Defendant also cites *Unidyne Corporation v. Aerolineas Argentinas*, 490 F. Supp. 391 (E.D. Va. 1984), and *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400 (E.D. Va. 1988) as cases in which the so-called "strict compliance" standard was applied. In *Unidyne*, however, the court dismissed the action not because the plaintiff failed to strictly comply with the FSIA, but rather because service was improper under the state long arm statute due to lack of personal jurisdiction. Accordingly, *Unidyne* does not support the petitioner's position.

LeDonne also fails to support petitioner's contention that the federal courts are split in their interpretation of the FSIA. In *LeDonne*, the court dismissed a default judgment, holding that the plaintiff had failed to obtain personal jurisdiction over the defendant in the underlying action, and therefore the judgment was invalid. The decision of the court was a result of the fact that the plaintiff had failed to serve, in any manner, the summons and complaint, and had failed to even attempt to serve a copy of the default judgment.

Petitioner contends that *Gerritsen v. Escobar*, 721 F. Supp. 253 (C.D. Cal. 1988), *aff'd*, 989 F.2d 340 (9th Cir. 1993), presents a conflict with the opinion of the Sixth Circuit. A review of the facts of *Gerritsen* does not establish such a conflict, because in *Gerritsen*, there was no finding that the defendant had actual notice of the suit, or that the defendant understood his rights under the laws of the United States.

II.

THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF THOSE COURTS THAT HAVE BEEN PRESENTED WITH ACTIONS INVOLVING SIMILAR FACTS AND CIRCUMSTANCES.

Petitioner contends, as a reason for granting the writ, that "the Sixth Circuit . . . has rendered a decision . . . in conflict with a decision of the Second Circuit in *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1044 (2d Cir. 1978)." (Petition at 7). This contention is both misleading and inaccurate. It is misleading because the Second Circuit affirmed the district court's decision in *Gray* without opinion. Accordingly, it cannot be known which standard the Second Circuit applied in deciding that case. Nevertheless, petitioner repeatedly refers to the Second Circuit's decision in *Gray* as adopting the strict compliance standard.

Petitioner's contention is also inaccurate, because the Sixth Circuit expressly agreed with the holding in *Gray*, explaining that in *Gray* "the purpose of the FSIA was not served and the court properly dismissed the case for insufficient service." *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (App. 8a). The Sixth Circuit explained, however, that under the facts of *Sherer*, strict enforcement of the technicalities of the FSIA would be inappropriate. The Sixth Circuit's decision is consistent with the decisions of the other federal courts that have been presented with similar fact patterns.

The Eleventh Circuit has held that "[t]he failure to follow precisely those steps in § 1608 designed to insure that actual service be made should not override and invalidate the fact that . . . notice was actually received." *Harris Corp. v. National Iranian Radio, Etc.*, 691 F.2d 1344, 1352 (11th Cir. 1982). The court

admonished plaintiffs to follow the service provisions of the FSIA, but noted that "the framework is designed to insure that foreign defendants will get notice," *Id.* at 1352 n. 16, and refused to dismiss the action because of a technical defect in service that did not result in prejudice to the defendant.

In *Obenchain Corp. v. Corp. Nacionale de Inversions,* 656 F. Supp. 435 (W.D. Pa. 1987), the District Court in the Western District of Pennsylvania held that dismissal is an improper remedy for a technical deficiency in service under the FSIA where actual notice is received:

> The purpose of the Act's requirements is to ensure actual notice to foreign states of the fact and substance of pending litigation. Where a party has received such notice, despite technical omissions in the manner of service, the purpose of the Act if not its letter has been satisfied.

Id. at 437 (citations omitted).

In *Banco Metropolitano v. Desarrollo de Autopistas,* 616 F. Supp. 301 (S.D.N.Y. 1985), the district court acknowledged the plaintiffs' failure to serve the defendant a translated copy of the complaint. The court, however, held:

> . . . in view of the receipt of actual knowledge of the summons and complaint . . . substantial compliance has been achieved . . . Given the nature of the issues presented and the problems intended to be addressed by the FSIA, strict enforcement of its technicalities here would be inappropriate.

Id. at 301.

Finally, several courts, in refusing to dismiss the plaintiff's claims due to a technical deficiency in service under the FSIA, have explained that the proper remedy is to afford the plaintiff time to reserve the defendant in compliance with the Act. "Thus, while requiring strict compliance with the requirements of the FSIA, where actual notice was received and no other defect existed these courts allowed the cases to go forward on the merits after the improper service was remedied." *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) (App. 8a). *See Alberti v. Empresca Nicaraguense de la Carner,* 705 F.2d 250 (7th Cir. 1983) (plaintiff not permitted to cure defect in service because court lacked subject matter jurisdiction); *Magnus Electronics, Inc. v. Royal Bank of Canada,* 720 F. Supp. 387 (N.D. Ill. 1985) (plaintiff not permitted to cure defect in service because court lacked subject matter jurisdiction); *Luccino v. Foreign Countries,* 631 F. Supp. 821 (E.D. Pa. 1986) (dismissal stayed to allow plaintiff the opportunity to effect proper service); *Lippus v. Dahlgren Mfg. Co.,* 644 F. Supp. 1473 (E.D.N.Y. 1986) (plaintiff afforded thirty days to serve defendant in compliance with the FSIA); *40 D 6262 Realty Corp. v. United Arab Emirates, Etc.*, 447 F. Supp. 710 (S.D.N.Y. 1978) (plaintiff permitted to effect proper service upon the defendant).

Defendant contends that there "should be only one position in the United States on the issue of whether strict or substantial compliance is required for effective service under the FSIA." (Petition at 18). In point of fact, there is only one such position; where actual notice of the lawsuit is received and substantial compliance with the Act is achieved, a technical deficiency in service will not defeat a cause of action. Where there is a dispute as to whether the defendant received actual notice, or the facts indicate that the defendant was prejudiced in its defense of the action due to a defect in service, the court will dismiss the action. The lower courts, including the Sixth Circuit, have consistently applied this test to actions involving an alleged defect in service under the FSIA.

III.

THE SIXTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE MANDATES OF THIS COURT AND THE POLICIES BEHIND THE FSIA.

This Court has explained that the recent procedural changes in the Federal Court System were prompted by the "general purpose . . . of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits," *Goldlawr v. Heiman,* 369 U.S. 463, 465-466 (1962). In accordance with that general purpose, cases should, whenever possible, be decided not on technicalities, but rather on the merits.

Petitioner seeks a reversal of the decision of the Sixth Circuit. Such a ruling by this Court would permit petitioner to avoid adjudication on the merits because of a technical defect in service which could easily have been remedied, and which caused no prejudice to petitioner's defense of this action. Not only would such a decision be inconsistent with the general policy of deciding cases on the merits, but it would also be in conflict with the policies behind the FSIA. The Sixth Circuit recognized "the important policy which the translation requirement safeguards . . . [but] in light of CASA's actual notice and lack of prejudice, [the court was] reluctant to allow procedure to triumph over substance." *Sherer v. Construcciones Aeronauticas, S.A.,* 987 F.2d 1246 (6th Cir. 1993) (App. 8a).

"The purpose of the Act's requirements is to ensure actual notice to foreign states of the fact and substance of pending litigation." *Obenchain Corp. v. Corp. Nacionale de Inversions,* 656 F. Supp. 435, 437 (W.D. Pa. 1987).

> Congress clearly wanted to insure that a foreign government would be apprised of the

> pendency of the lawsuit because (b)(3) requires specifically that the service be "reasonably calculated to give actual notice. . . ." Comprehension of the court documents from a sovereign land is aided if they are accompanied by a translation in the defendant's language, especially if there may not be ready access to translators or interpreters. § 1608(b)(3) is therefore designed so that upon receipt of a Summons and Complaint in their own country, non-English-speaking governments will not be handicapped by a language barrier in their inability to respond to a distant lawsuit.

Lippus v. Dahlgren, 644 F. Supp. 1473, 1478-1479 (E.D.N.Y. 1986).

> Rather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign entities. In addition, Congress wished to insure that the sovereign owner would receive actual notice. H.R. Rep. No. 94-1487, *supra* at 23-24.

Velidor v. L/P/G Benghazi, 653 F.2d 812, 821 (3rd Cir. 1981). Accordingly, the decision of the Sixth Circuit is consistent with not only the policy behind the service provisions of the FSIA, but also with the greater purpose of the Act itself. Furthermore, the Sixth Circuit's decision advances the policy mandated by this Court that cases should, whenever possible, be adjudicated on the merits and not on procedural technicalities.

CONCLUSION

For the reasons set forth above, respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONSTRUCCIONES AERONAUTICAS, S.A.,
a Foreign Corporation,

Petitioner,

- v. -

DIERDRE M. SHERER, Administratrix of the Estate of
David W. Sherer, deceased,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

I

There is a Genuine Conflict Among the Sixth, Second and Ninth Circuits on the Issue for Review

The Petition[1] for a Writ of Certiorari presents the issue whether "substantial compliance" or "strict

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[1] Petitioner Construcciones Aeronauticas, S.A. ("CASA"), the defendant in the district court, is an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603(b) (1988).

compliance" with the procedures established by Congress is required to obtain *in personam* jurisdiction over a foreign state under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441 and 1602 *et seq.* (1988).

Respondent opposes CASA's Petition because she contends that there is no conflict among the circuits and that the various decisions of the circuits and the district courts on this issue can be reconciled factually on two points. First, the courts which followed the substantial compliance rule did so because the defendant had actual notice of the lawsuit. Secondly, the courts which followed the strict compliance rule and found lack of effective service of process permitted the plaintiff the opportunity to re-serve the foreign state, without dismissing the action.

These attempted factual distinctions merely highlight the fact that there is a difference of opinion in the circuit courts, recognized by the Sixth Circuit in this case and the district court in *Obenchain Corp. v. Corporation Nacionale de Inversiones*, 656 F. Supp. 435 (W.D. Pa. 1987), *aff'd in part and order vacated in part*, 898 F.2d 142 (3d Cir. 1990), regarding whether strict compliance or substantial compliance is required under the FSIA.

The conflict among the circuits became more pronounced in 1993, as the Ninth Circuit joined the Second Circuit in requiring strict compliance with the service of process provisions of the FSIA. In *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340 (9th Cir. 1993), the Ninth Circuit upheld the dismissal of a complaint against the Mexican Consulate as a "foreign state" because the plaintiff, as in the present

case, failed to send, through the clerk of the court, a translation of the complaint to the foreign state.

Furthermore, contrary to respondent's argument, there is in fact evidence in the opinion in *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978), that the Congo Mission received "actual notice." The court there stated: "[t]he defendant [probably the word "plaintiff" was intended] argues that the Congo Mission had a clear understanding of the legal situation and was given ample notice of the action against it." *Gray*, 443 F. Supp. at 820-21. However, the court added:

> [w]hether this be true or not, informal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements.

Gray, 443 F. Supp. at 821.

In support of her contention that the Congo Mission did not receive "actual notice" in *Gray*, respondent quotes a later paragraph of the opinion that "[i]t is obvious that the officials of the Congo Mission did not understand their rights under American law. . . ." *Id.* In the context of the opinion, however, the court in that paragraph obviously is referring to the reason why the Congo Mission did not timely remove the action rather than to any lack of actual notice.

Respondent writes on page 11 of her Brief:

> Defendant contends that there "should be only one position in the United States on the

> issue of whether strict or substantial compliance is required for effective service under the FSIA". (Petition at 18). In point of fact, there is only one such position; where actual notice of the lawsuit is received and substantial compliance with the Act is achieved, a technical deficiency in service will not defeat a cause of action.

Respondent's Brief at 11.

The decisions in *Gray* and *Gerritsen*, in contrast with the Sixth Circuit's decision in the case at bar, establish that this statement is not correct. Actual notice, or the lack thereof, was not a factor in the dismissals in the *Gray* and *Gerritsen* cases. Rather, there was simply a failure on the part of the plaintiff to comply with the service provisions of the FSIA and the courts in *Gray* and *Gerritsen* decided they were bound to enforce the service procedures established by Congress. In *Gray*, the Court also stated that notification (actual notice) is not a substitute for compliance with the statute.

II

The Issue for Review is Whether the Requirements for Jurisdiction Over a Sovereign Established by Congress should be Strictly Adhered to in the Case of a Foreign Sovereign as is Currently the Case for the United States

The issue for review is fundamentally one of statutory construction: whether the precise and unambiguous service provisions of the FSIA should be given a plain meaning construction, or whether substantial compliance with the statute is all that is required when the foreign sovereign receives "actual notice" of a lawsuit.

Does the fact that the defendant foreign sovereign received "actual notice" relieve the plaintiff of proper service? Must the foreign sovereign appear and contest the service or can it rely upon the courts of the United States to enforce the service requirements Congress has established?

Respondent attempts to trivialize the issue as a "procedural technicalit[y]" or a "triumph of procedure over substance". The Court in *McNeil v. United States*, 124 L.Ed.2d 21 (1993) unanimously found nothing trivial about petitioner's failure in that case to comply with the procedural requirements established by Congress in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 *et seq.*: namely, that administrative remedies, which are jurisdictional prerequisites to suit, must be exhausted prior to the institution of any lawsuit against the United States. The Court accepted the *McNeil* case for review because of a conflict in the circuits on the very issue of the significance of jurisdictional prerequisites to suit under a statute waiving sovereign immunity, namely, the FTCA.

The Seventh Circuit had upheld the plain meaning of the statute that suits against the United States must be instituted within six months of an administrative denial. The court held that this requirement was not satisfied where a suit was commenced before the administrative denial. This Court stated in *McNeil*:

> Because decisions in other Circuits permit a prematurely filed FTCA action to proceed if no substantial progress has taken place in the litigation before the administrative remedies are exhausted . . ., we granted certiorari to resolve the conflict.

McNeil, 124 L.Ed.2d at 27 (citations omitted).

The gloss which the circuits had placed upon the institution of suit under the FTCA is similar to the gloss of "actual notice" and "substantial compliance" the Sixth Circuit placed upon the service provisions of the FSIA. In *McNeil*, the Court rejected such construction because the statute was unambiguous. The Court stated: "We are not free to rewrite the statutory text." *Id.*

> The interest in orderly administration of this body of litigation [FTCA litigation] is best served by adherence to the straightforward statutory command.

McNeil, 124 L.Ed.2d at 28.

> As we have noted before, 'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

McNeil, 124 L.Ed.2d at 29, (quoting *Mahasco Corp. v. Silver*, 447 U.S. 807 (1980)).

Strict compliance with the administrative procedures of the FTCA is required to obtain jurisdiction over the United States under the FTCA. Are foreign sovereigns to be treated any differently? Modelled in part upon the FTCA, the FSIA, to some extent, was enacted to put foreign sovereigns on the same footing as the United States, namely, sovereigns may be sued in United States courts, but only if the jurisdictional prerequisites to suit are strictly complied with.

Unlike the Second and Ninth Circuits which adhered to clear and unambiguous statutory service re-

quirements of the FSIA, the Sixth Circuit in the case at bar, as well as the Third and Eleventh Circuits, found substantial compliance sufficient, when the foreign state had received actual notice of the pending suit. There is, therefore, a clear and current conflict among the circuits on the issue whether strict compliance or substantial compliance with the service provisions of the FSIA is required to effect *in personam* jurisdiction over a foreign state.

CONCLUSION

For the reasons set forth herein, and in the Petition, petitioner prays that its petition for writ of certiorari be granted.

Respectfully submitted

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